United States Court of Appeals

for the Second Circuit



BRIEF FOR APPELLANT

77-1015

To Be Argued By: Andrew B. Bowman

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1015

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P/S

UNITED STATES OF AMERICA,

APPELLEE,

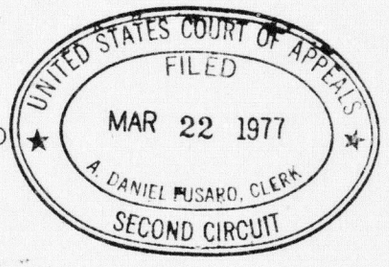
-vs-

JAMES APUZZO,

APPELLANT.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF APPELLANT, JAMES APUZZO



Andrew B. Bowman
Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
Attorney for Appellant
(FTS) 8-643-8148

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STATUTES INVOLVED

18 U.S.C. Section 922(a)(1):

> (a) It shall be unlawful--
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition.

18 U.S.C. Section 924(a):

> (a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

RULES OF EVIDENCE INVOLVED

Federal Rule of Evidence 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cummulative evidence.

Federal Rule of Evidence 404(b):

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Federal Rule of Evidence 609(a):

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

STATEMENT OF THE ISSUES

I. Did the trial judge err when he failed to exclude appellant's prior conviction for possession and transportation of untaxed cigarettes?

II. Did the trial judge err in overruling appellant's objection to the informant's testimony that other crimes were being committed by appellant?

III. Did the prosecutor's closing argument violate permissible standards of prosecutorial conduct and prejudice appellant's right to a fair trial?

IV. Was the government's evidence of propensity or willingness insufficient to overcome the evidence of governmental inducement and the defense of entrapment?

STATEMENT OF THE CASE

On April 7, 1976, a federal grand jury at New Haven returned a one-count indictment charging James Apuzzo, the appellant, with violation of 18 U.S.C. Sections 922(a)(1) and 924(a), that is, engaging in the business of dealing in firearms without being licensed to do so. On September 20, 1976, appellant filed a motion for disclosure of the address of the informant, Robin Bourgeois, who was subsequently served with a subpoena. On October 20, 1976, before U.S. District Judge Robert C. Zampano at New Haven a jury of twelve and two alternates was selected, and a motion to suppress an oral statement of the defendant was filed. After a hearing the motion was denied on October 28, 1976. On October 27, 1976, appellant filed a Motion for Determination of Admissibility of Prior Convictions and the government called its first of two witnesses, Agent Charles Peterson of the Bureau of Alcohol, Tobacco and Firearms. On October 28, 1976, Judge Zampano excluded three prior convictions of the appellant and permitted the government to impeach the defendant with a 1975 misdemeanor conviction for possession and transportation of untaxed cigarettes. On that date Judge Zampano denied appellant's motions for judgment of acquittal at the close of the government's case and at the close of all the evidence. On October 29, 1976, the jury found the defendant guilty. On December 14, 1976, Judge Zampano imposed a committed sentence of three years,

which is being stayed pending appeal. Timely Notice of Appeal was filed on December 20, 1976.

STATEMENT OF FACTS

The Prosecution Case

The government presented two witnesses, special agents Charles Peterson and James Waterson of the Bureau of Alcohol, Tobacco and Firearms. Peterson testified that on February 26, 1976, he telephoned James Apuzzo to arrange for the purchase of firearms from Mr. Apuzzo that afternoon. (T. 16.) Peterson further testified that on the afternoon of the 26th of February he met the appellant in a parking lot to the rear of a Howard Johnson's restaurant on Long Wharf Pier in New Haven. Peterson testified that he paid James Apuzzo $275 for a Winchester 12 gauge shotgun and a Mauser rifle. T. 18-19.) Peterson testified that after the sale was completed he left his phone number with James Apuzzo. On March 16, 1976, Peterson called Apuzzo and asked for more firearms, and, according to Peterson, Apuzzo stated that he had a couple of small handguns but they weren't too good. (T. 22.) On March 22, 1976, Peterson again spoke telephonically with Apuzzo and asked for revolvers, but according to Peterson, Apuzzo hadn't obtained the revolvers yet. (T. 23.) On April 5, 1976, Peterson again called Apuzzo, and Apuzzo told Peterson that he had eight firearms to sell, six rifles and two handguns, for $550. They agreed to meet the following day April 6, 1976, at the rear of the Howard Johnson's parking lot. On April 6 agent James Waterson, who accompanied Peterson on this occasion and

also on February 26, paid Apuzzo $550 in exchange for eight firearms. (T. 24-25.) According to Peterson, appellant told Peterson he could get rid of a hundred of them [Colt Cobras] if he had them and that the guns could not be traced. (T. 25.) After the sale the appellant was arrested. Waterson's testimony was basically corroborative of Peterson. Waterson also testified to a post-arrest conversation with James Apuzzo. According to Waterson, Apuzzo stated that he thought it was legal to sell guns and had bought these guns from people who advertised in the Penny Saver Magazine. When Waterson asked for the names of the people from whom Apuzzo had purchased the guns, Apuzzo stated that "we" were "wasting each other's time." (T. 148-149.)

The Defense Case

The defense presented evidence which showed that Robin Bourgeois and Peterson, who used the name Prince, induced the appellant into selling the firearms and that the inducement was accomplished through constant phone calls and pressure from August, 1975, through April, 1976. The defense called four witnesses, the first of whom was Robin Bourgeois, who had been paid $320 for his work as an informant by Alcohol, Tobacco and Firearms. James Apuzzo testified in his own behalf and was followed by Steve Gagliettino and Lucy Gagliettino, appellant's brother-in-law and sister.

Robin Bourgeois*

The informant, Bourgeois, appeared in court in response to a subpoena issued by the appellant which subpoena Bourgeois had been avoiding. (T. 162-163.) Bourgeois was paid $20 on November 1, 1975, $20 on December 10, 1975, $10 on December 19, 1975, $20 on March 11, 1976, and $250 at the end of May for a total of $320. (T. 164-165.) Bourgeois testified that in October, 1975, he came to Apuzzo at the New Haven Register where they both worked and told him that he had "people" who would "pay top dollar" for pistols, rifles and shotguns. (T. 166.) Bourgeois asked Apuzzo for any weapons he could get. Bourgeois called Apuzzo weekly and asked for weapons. (T. 167.) In November Bourgeois testified that he called the appellant and asked him for handguns and large caliber rifles. Bourgeois constantly held out the lure of people with money. (T. 167-168.) In December Bourgeois called and asked for guns. At a December 10, 1975 meeting, between Apuzzo, Peterson and Bourgeois on Skiff Street in Hamden, Bourgeois testified that Peterson asked the appellant for heavy weapons and sawed-off shotguns. (T. 170.) In January Bourgeois was no longer employed and didn't "deny" calling Apuzzo at the Register. In January Bourgeois was hoping to receive over $100. He would discuss with Peterson what approaches to use and was in regular contact with the agent. Again in February, 1976, Bourgeois testified that he asked the appellant for guns. (T. 170.)

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* The informant refused to speak with defense counsel or his investigator prior to trial.

Bourgeois further testified that Apuzzo was his friend and that he had tricked him. (T. 171.) While Bourgeois testified that he didn't expect payment in the beginning, he came to expect it because he was told he would be paid. (T. 171.) In March Bourgeois called appellant once a week, and appellant knew what type of weapons Peterson and Bourgeois expected. (T. 172.)

In sum, Bourgeois admitted that he was paid to call Jim Apuzzo, ask him to sell guns, tell him that people would pay top dollar for guns and introduce appellant to Peterson. (T. 134.)

Charles Peterson

On cross-examination Peterson testified that he instructed Bourgeois to telephone the appellant and ask him if the appellant could get guns. (T. 38.) Payments to Bourgeois were made as set forth above when Peterson felt they were "necessary" and when he felt Bourgeois had "earned it." (T. 40.) After Peterson testified to a November 1st purchase of a Mossberg rifle which the appellant disputed, Peterson testified that on December 10, 1975, he met Jim Apuzzo and asked Jim Apuzzo for sawed-off shotguns and heavy weapons. (T. 43, 77.) On December 10, 1975, appellant did sell two of his brother-in-law's rifles to Peterson and gave the money to the Gagliettino's who needed the money for Christmas. Peterson gave the appellant his phone number at that meeting. (T. 43.)

In February Peterson called the appellant and asked him for guns. Peterson testified that he was asking appellant to commit a crime. (T. 47.) In March Peterson called appellant again and admitted to telling the defendant that he had people in Boston who'd pay top dollar for guns. T. 49.) Finally Peterson testified that in April, 1976, Robin Bourgeois participated in the solicitation of the weapons for the April 6 sale. (T. 51.) Peterson also testified that a person could sell up to ten guns without being licensed to do it. (T. 56.)

James Apuzzo

The appellant took the stand and testified that he had pleaded guilty to the transportation and possession of untaxed cigarettes on direct examination (since the trial judge refused to exclude the misdemeanor conviction). T. 207-208.) A life-long resident of New Haven, appellant met Robin Bourgeois at the New Haven Register where they both worked in the late summer of 1975. Bourgeois worked as a loader on the platform, and appellant was a truck driver. James Apuzzo also sold small items to supplement his earnings such as cigarette lighters, perfume, purses, and toys which he bought from variety stores in Bridgeport and New Haven. (T. 209.) James Apuzzo testified that in late August, 1975, Bourgeois approached him and asked if Apuzzo ever came across firearms, i.e., shotguns, rifles and pistols. Appellant told Bourgeois "that's not my thing" and Bourgeois

said if you ever come across some, make me the first one to know it. By September, 1975, Bourgeois spoke to Apuzzo about firearms on a daily basis saying: "I need shotguns--I have people that are very interested in shotguns and pistols and sawed-off rifles and sawed-off shotguns. The appellant again told Bourgeois: "I don't come into these things." (T. 211.) The same pattern of solicitation continued throughout September, 1975. In late October, appellant was out of work and received a call from Bourgeois who told appellant that he had people from Boston that would pay any kind of money. He asked for shotguns and rifles. When the appellant asked Bourgeois why Bourgeois was doing this, Bourgeois told him he would get so much money per gun. (T. 212-213.) Appellant denied ever making the November 1st sale. (T. 218.) In November Bourgeois called three or four times a week asking for guns. In December Bourgeois continued the pressure, first asking for cigarette lighters and small items appellant sold and then switching the conversation to firearms. In December at the home of appellant's sister, Lucy Gagliettino, Steve Gagliettino asked appellant if he knew anyone who would be interested in buying a rifle and a shotgun which he had used for hunting (T. 214). Since appellant knew of his sister's financial problems, he contacted Bourgeois and Bourgeois arranged for a meeting with the Gagliettino's, Apuzzo, and Bourgeois, agreeing to a price of $250. Appellant drove to Hamden

where he met Bourgeois and Charlie Prince (Peterson). T. 216.) After the sale was completed, Prince asked for sawed-off shotguns, pistols, rifles, and high powered rifles. Appellant told Prince, "this is not my thing." (T. 217.) Appellant told Prince that the firearms were his brother-in-law's who was out of work. After the meeting, appellant went directly to his sister's house, and gave her the money.

Immediately after the Christmas holidays, Bourgeois called appellant and said that they should now get down to some serious rifles and shotguns. (T. 218.) Appellant responded by again telling Bourgeois, "I don't come into these things, these were my brother-in-law's. (T. 219.) During January, 1976, Bourgeois called three to four times a week asking for rifles, shotguns and pistols to which appellant responded, "It's not my business, I don't have it, I don't come into those things." (T. 219.) Prince also contacted appellant over the phone in January advising appellant that he wanted pistols or shotguns, that he had people in Boston who could come up with any kind of money for any amount of guns that "you could bring us." Appellant again responded that he didn't have these things and didn't come into them. (T. 220.) Prince's calls came two to three times a week. In February Bourgeois called and asked for shotguns and pistols to which requests appellant said NO. T. 221.) Prince also called in February asking for guns and Bourgeois would refer to Prince when speaking to appellant.

Appellant denied ever selling two firearms to Peterson on February 26, 1976. (T. 226.)

In March the same pattern of calls from Prince continued, and Prince told appellant that he had a buyer named Jim (Waterson) from Boston who had plenty of money. (T. 222.) Again appellant responded by saying I don't have any. Appellant denied ever offering to sell a case of rifles to Prince and testified that Prince informed him that they would be able to buy a case of rifles. Prince called at least twice a week in March. During March appellant was working as a painting contractor. (T. 222.)

Toward the end of March, appellant was looking for a used car in the Bargain News. In the Bargain News appellant saw a page and a half of gun advertisements. He called one of the numbers and asked if the guns were still for sale and the seller told him the price would be $350-$400. Appellant had accumulated some money to pay rent and food bills and felt that if he could make $150 by selling the guns to Bourgeois and Prince it would take care of some of his outstanding bills. Finally after eight months of pressure, appellant succumbed. He purchased the firearms on April 4 from the seller in the J.M. Fields parking area who drove a 1959 Chevrolet. He brought the guns home, contacted Bourgeois, and on April 6 made the "April 6 sale" after which he was arrested. After his arrest, appellant told Waterson that he thought it was legal to sell the guns. (T. 226.)

James Apuzzo testified that if it had not been for the pressure of Bourgeois and Prince he never would have sold the guns (T. 226) and further testified that he never offered to sell Prince any type of gun, shotgun, or pistol. (T. 227.)

Steve and Lucy Gagliettino

The Gagliettino's corroborated the circumstances of the December 10, 1975, sale of Steve Gagliettino's shotgun and rifle and that they had received calls from Bourgeois looking for appellant at their home. * (T. 241-250.)

The facts presented the jury with sharply contested issues to resolve, foremost among them the credibility of the defendant, the informant, and the agent, Peterson. Since credibility was such a key issue, the admission of appellant's prior conviction and the prosecutor's closing played a substantial and prejudicial role in the verdict of the jury.

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* There was never any dispute concerning the fact that Steve Gagliettino's shotgun and rifle were legitimately purchased by Mr. Gagliettino.

I. THE TRIAL JUDGE ERRED WHEN HE FAILED TO EXCLUDE APPELLANT'S PRIOR MISDEMEANOR CONVICTION FOR POSSESSION AND TRANSPORTATION OF UNTAXED CIGARETTES.

Prior to trial the appellant filed a Motion for Determination of Admissibility of Prior Convictions pursuant to Rule 609 of the Federal Rules of Evidence. On the second day of trial, after argument (App.-Tr. 111-122), the trial judge excluded three of the four prior convictions of James Apuzzo (App.-Tr. 120) which the government wished to use solely to impeach the testimony of the appellant when he took the witness stand. (App.-Tr. 112). The trial judge refused to exclude 1975 misdemeanor convictions for possession and transportation of untaxed cigarettes because of the Second Circuit's decision in United States v. DeAngelis, 490 F.2d 1104 (2d Cir. 1974).

> I must admit, were it not for the DeAngelis case and the references in Toto[1] to the Second Circuit as being more liberal [in admitting prior convictions] I wouldn't even allow the 1975 conviction to come in. (App.-Tr. 120.)

Prior to Judge Zampano's ruling, appellant pointed out that the DeAngelis decision preceded the enactment of Rule 609 and further that the conviction at issue was not a crime like perjury, obtaining money under false pretenses or embezzlement which were crimes going to the heart of credibility. Nevertheless, the

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1. Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976).

trial judge felt "bound" by Judge Lumbard's decision in DeAngelis. The appellant subsequently testified in his own behalf, and his counsel elicited the conviction on direct examination (App.-Tr. 207-208.)[2] The appellant had pleaded guilty to the charges of transporting and possessing untaxed cigarettes in New Jersey and was fined $750 and placed on probation for one year when two six-month sentences were suspended. (App.-Tr. 117, 207-208.)

The denial of appellant's motion to exclude the convictions from evidence was reversible error under the circumstances of this case for three reasons. First, the trial judge did not properly apply Rule 609, although the issue was clearly presented in those terms. Second, the DeAngelis rule was improperly applied to the facts of this case in view of the enactment of Rule 609(a)(2). Third, in light of the similarity of the two offenses, the possibility of prejudice to the defendant outweighed the probative value of the prior conviction on the issue of credibility. Certainly a jury could draw the prejudicial and unfair inference that a person who possesses or transports cigarettes without obtaining the proper tax stamp from the government would also deal in firearms without obtaining a license from the government.

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2. The appellant did not waive this point by bringing out the conviction himself on direct examination. Unlike the "peculiar situation" in United States v. Mariani, 539 F.2d 915, 920-921 (2d Cir., 1976), the trial court ruled the prior conviction admissible for credibility, not for motive or the like. The prosecutor also referred to the conviction in cross-examination.

A. The Prior Conviction for Possession and Transportation of Untaxed Cigarettes Was Not Automatically Admissible Under Rule 609(a)(2) Because It Did Not Involve Dishonesty or False Statement.

The passage of the Federal Rules of Evidence, applicable to trials commencing after July 1, 1975, such as appellant's has altered many aspects of the law of evidence in federal courts, including the principles governing the use of prior convictions for impeachment. Under Rule 609(a) there are two grounds for admitting such convictions.[3] One is provided in Federal Rules of Evidence 609(a)(2) and is automatic.[4] The judge has no discretion to exclude a conviction if it involves "dishonesty or false statement, regardless of punishment." Recognizing that the meaning of this phrase might be open to dispute, the House-Senate Conference Committee made clear that this subsection of the rule applies only to a narrow class of offenses:

> By the phrase 'dishonesty and [sic] false statement' the Conference means crimes such as perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

H. Conf. Rep. 93-1579, 93d Cong., 2d Sess. (Dec. 14, 1974), reprinted in 4 U.S. Code Cong. & Adm. News 7051, 7103 (1974).

3. For the text of the Rule, see page iv.

4. The other ground is set forth in Rule 609(a)(1) and applies only to felony convictions.

This rule relating to crimen falsi effects two changes in the prior law of this Circuit. Cf. Kaufman v. Edelstein, 539 F.2d 811, 818 (2d Cir. 1976); United States v. Zubkoff, 416 F.2d 141, 143 (2d Cir. 1969), cert. den., 396 U.S. 1038 (1970) (recognizing potential impact of new rules on prior evidence law). First, i eliminates the discretion to exclude such convictions recognized in United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), cert. den., 394 U.S. 947 (1969). Second, however it creates a category different from any previously recognized by this Court of convictions which involve "dishonesty." Since these misdemeanor convictions have no relation to the crimes of dishonesty or false statement, they do not fall within the special category reserved for convictions which necessarily involve untruthfulness under Rule 609(a)(2).

B. Under Rule 609 the DeAngelis Case was Improperly Applied to A Misdemeanor Conviction Which Was Not Crimen Falsi.

In United States v. DeAngelis, 490 F.2d 1004 (2d Cir. 1974), the Second Circuit held that a trial judge did not abuse his discretion in admitting a 1966 conviction for transportation and possession of untaxed cigarettes to impeach the credibility of a defendant on trial in a cocaine prosecution. The Court held that the prejudicial effect of the prior conviction did not so outweigh the probative value of the testimony as to require its exclusion. The Court applied the Palumbo test which states that "a trial court is required to exclude use of a prior conviction for impeachment only if evidence of such a conviction

negates credibility only slightly, but creates a substantial chance of unfair prejudice," at 1009. The Palumbo-DeAngelis test is not applicable to a misdemeanor, since the enactment of Rule 609, because 609(a)(2) permits impeachment only if the misdemeanor conviction was crimen falsi, and this conviction was not.

C. Prejudice.

Appellant was severely prejudiced by the admission of the prior convictions, because they bore a strong similarity to the charge for which appellant was on trial. The jury could easily infer that a man who was convicted previously of possessing and transporting cigarettes without obtaining a tax stamp from the government, would be very likely to deal in firearms without obtaining a license from the government. The Second Circuit has recognized that "reference to a defendant's criminal record is always prejudicial. The average jury is unable, despite curative instructions, to limit the influence of a defendant's criminal record to the issue of credibility." United States v. Puco, 453 F.2d 539, 542 (2d Cir. 1971). The Puco court took further note of this problem:

> The potential for prejudice, moreover, is greatly enhanced where, as here, the prior offense is similar to the one for which the defendant is on trial.... In view of the substantial likelihood of prejudice, any decision to permit impeachment by reference to convictions for crimes similar to the one for which a defendant is on trial requires particularly careful consideration by the trial judge of the probative value of the prior convictions.

Id. (citations and footnotes omitted.) The potential for prejudice was great because appellant's testimony in his own defense was crucial on the issue of entrapment. As Judge Elfvin recently put it: "If . . . the case were going to be determined quite substantially on the credibility of the defendant-witness, admission of earlier convictions would be highly prejudicial." United States v. Brown, 409 F. Supp. 890, 892 (W.D.N.Y. 1976). Since appellant was seriously prejudiced by the admission of the very similar prior convictions, and these prior misdemeanor convictions were not crimes of dishonesty and false statement, this conviction must be reversed.

II. THE TRIAL JUDGE ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE INFORMANT'S TESTIMONY THAT OTHER CRIMES WERE BEING COMMITTED BY APPELLANT.

The informant was called as a witness by appellant. On cross-examination the prosecutor asked the informant, Bourgeois, what his motive was when he originally contacted law enforcement authorities. (App.-Tr. 175-177.) After explaining that he had worked as an informant on several cases, the prosecutor asked what Bourgeois had told a North Haven Detective about this case. (App.-Tr. 177.) When appellant's counsel objected, the trial judge sustained the objection on relevance grounds. Then the prosecutor asked Bourgeois whether he was looking for money when he contacted the police to which Bourgeois responded that he was not. (App.-Tr. 177.) "Were you looking for anything?" "No." (App.-Tr. 178.) Presumably knowing what the response would be, the prosecutor then asked Bourgeois what his motive was for contacting the police. Counsel objected and the court overruled the objection. Bourgeois then stated:

> Well, I--in the past two years, I have been looking forward to a career in law enforcement and any chance that I had to learn, to observe, to participate in law enforcement, I would take. And seeing that a crime was being committed, I-- (App.-Tr. 178).

Counsel promptly objected and the court overruled the objection. The prosecutor did not stop there and asked, "What crime do you think was being committed?" Counsel again objected and

was overruled by the trial judge. The informant answered, "The crime itself, what appeared to me, was stolen articles being fenced to--" (App.-Tr. 178). Counsel promptly objected and moved for mistrial at side bar. After discussion at side bar, the trial judge then denied the mistrial motion and cautioned the jury that while they could consider the testimony concerning the informant's thought process, they should ignore the informant's references to any other crime that the informant thought might have been committed by the defendant. (App.-Tr. 178-182.)

The admissibility of testimony concerning other crimes is governed by Rule 404(b) of the Federal Rules of Evidence.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, place, knowledge, identity, or absence of mistake or accident.

The informant's response to the question concerning his motive was known by the prosecutor when he asked the question. If this were not so, the proseuutor would not have pressed the matter after establishing that Bourgeois expected no money at the beginning of his involvement and further expected nothing. The only reason for pressing the issue was to evoke a prejudicial and non-probative response which was completely unnecessary and uncalled for. The informant's testimony that in his opinion the appellant was fencing stolen goods not only was

prejudicial and confusing to the jury in a case in which the defendant was not charged with any offense relating to theft, but also had no probative value with respect to the appellant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See Federal Rule of Evidence 404(b). Even assuming arguendo that this opinion testimony had some tangential relevance, which we do not concede, it should have been excluded under Rule 403 of the Federal Rules of Evidence which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....

While trial court's have discretion to admit or exclude evidence, it is plain that a trial court's discretion is far from unlimited, and appellate courts have a vital role to play in overseeing the exercise of this discretion. United States v. Robinson, 544 F.2d 611, 616 n.6 (2d Cir. 1976).

> The deep tendency of human nature to punish, not because one [defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury in or out of court.

United States v. Robinson, Supra at 618 citing 1 J. Wigmore Evidence Section 57 at 456.

In assessing whether the error in admission of this testimony was reversible the question "is not whether there

is substantial evidence to support the judgment but whether error affected the judgment." Id. at 619. While appellant was on trial for unlicensed dealing in firearms, the jury also heard evidence that the appellant was a fence for stolen goods, at least in the informant's opinion, and that he had been convicted of possession and transportation of untaxed cigarettes, the admission of which for impeachment purposes we have also claimed to be reversible error. No cautionary instruction could remove the "bad man" impression from the jury's mind so that they could properly focus on the charge in the indictment or the defense of entrapment. The cautionary instruction given by the trial judge, that the jury should consider the motive of the informant but ignore the informant's testimony that he went to the police because he felt the appellant fenced stolen goods, was impossible to follow. No jury could draw that fine a line so as to remove the prejudice to the appellant from this inadmissible opinion testimony. The trial judge's failure to sustain appellant's objection to such testimony and failure to grant appellant's motion for mistrial constituted error requiring reversal.

III. THE PROSECUTOR'S CLOSING ARGUMENT VIOLATED PERMISSIBLE STANDARDS OF PROSECUTORIAL CONDUCT AND PREJUDICED APPELLANT'S RIGHT TO A FAIR TRIAL.

The appellant, James Apuzzo, respectfully submits that the summation of the Assistant United States Attorney violated permissible standards of prosecutorial conduct as set forth in this Circuit's decisions. United States v. Burse, 531 F.2d 1151 (2d Cir. 1976); United States v. Drummond, 481 F.2d 62 (2d Cir. 1973). When the prosecutor finished his summation, counsel moved for mistrial which motion was denied by Judge Zampano. (App.-Tr. 278-280.)

The trial of this case lasted three days. The government called Agents Peterson and Waterson, and the defense called the informant, Robin Bourgeois, the defendant, James Apuzzo, Steve Gagliettino and Lucy Gagliettino. The government's witnesses testified that James Apuzzo had sold them two firearms for $275 on February 26, 1976, and eight firearms on April 6, 1976, for $550. The defendant, James Apuzzo, testified that he never sold the agents two firearms on February 26, 1976. He admitted the April 6, 1976 sale, but testified that he sold the firearms only for necessaries since he was out of work, and further that Robin Bourgeois (the paid informant) and Charlie Prince (Peterson) had pressured him into making the sale. Clearly the jury was required to resolve the issue of the witnesses' credibility. Government counsel argued that Apuzzo was predisposed to commit the

crime, and defense counsel argued that the defendant was entrapped.

The prosecutor began:

> ... It is an important case for the defendant, obviously, but it is also an important case for the government, because whenever a crime has been committed, the government is very concerned, ... (App.-Tr. 262.)

The first expression of personal opinion as to defendant's ability to procure firearms came when the prosecutor referred to a March 22nd telephone conversation between Peterson and the defendant where Peterson testified that he called the defendant looking for pistols. According to Peterson, the defendant said that he didn't have the pistols yet, but call me back. Since there never was a sale of pistols the prosecutor stated:

> Well he never got those pistols. I think the conversation is very significant. Again, ability to get--at least a stated ability to get pistols. (App.-Tr. 266.)

The prosecutor then characterized the defendant as a criminal.

> --the government is providing the means for the defendant or another criminal to carry out an already existing criminal purpose. (App.-Tr. 269.)

In referring to the dispute over the February 26th sale, the prosecutor stated:

> You heard Special Agent Waterson and Peterson testify that it did happen. They were both there. Are they lying? Is that what he [defendant] wants you to believe.

This comment by the prosecutor set the stage for his most personal voucher for the truth of the government's witnesses and the fabrication of the defense.

> But I think you can see how the defense has approached this. Deny the February 26 sale. Deny the November 1st. Deny everything that you can get away with denying. And if you accept those denials, you are saying that two government agents, took notes, who testified as to certain transactions and conversations, lied to you. And I submit that's not the case. (App.-Tr. 273.)

This argument violated Burse and Drummond since it not only vouched for the truth of the government's witnesses, but clearly and explicitly asked the jury to believe not only that the defendant had lied, but also that his lawyer participated in the fabrication. The improper and derogatory comment about the defense was almost identical to that condemned in United States v. Burse, supra at 1154 paragraph (e). This improper and derogatory comment was strikingly similar to that condemned in United States v. Drummond, supra, where the prosecutor in that case stated, "Now, I suppose according to defense counsel's theory, the government's lying about that too." Id. at 64. But this comment was worse.

After defense counsel finished his summation, the prosecutor, in referring to the newspaper in which the defendant had testified he saw guns advertised and had purchased the guns for the April 6, 1976 sale, stated:

> Mr. Bowman says this is a very important case for the defendant.

> I agree. And if you are confronted with an important, serious federal felony charge against you, do you think you are not going to be able to go out and come up with that paper? Three days? You say you bought it from somebody in Branford. You recognize him. The paper is going to have a phone number. Have you got in contact with him. You can't find it? Its preposterous. (App.-Tr. 276.)

The prosecutor's use of the term preposterous when characterizing the defense was condemned in Drummond, supra 481 F.2d at 64. The prosecutor did not stop there:

> Mr. Bowman is trying to put the government in a bad light. They're picking on the defendant. The Government doesn't pick and choose people it prosecutes. That's not what happened in this case. (App.-Tr. 277.)

This final venting of temper was the prosecutor's final voucher for the goodness and righteousness of the government and the implication that the government and its witnesses including a paid informer could not possibly be wrong.

After the summation was concluded counsel moved for mistrial rather than object at each instance, since objection in mid-argument would serve only to highlight the inflammatory nature of the prosecutor's argument. The prosecutor's remarks were uncalled for by defense counsel's summation which the trial judge characterized as excellent. (App.-Tr. 280.) The prosecutor's summation violated permissible standards of prosecutorial conduct and denied appellant a fair trial. As the Supreme Court stated:

> The United States Attorney [or his assistant] is the representative not of an ordinary party to a controversy ... whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. ... while he may strike hard blows, he is not at liberty to strike foul ones ....

Berger v. United States, 295 U.S. 78, 88 (1935). Since the credibility of the defendant was so crucial on the issue of entrapment, the entire defense was irreparably prejudiced by the summation of the prosecutor. The conviction should be reversed.

IV. THE GOVERNMENT'S EVIDENCE OF PROPENSITY OR WILLINGNESS WAS INSUFFICIENT TO OVERCOME THE EVIDENCE OF GOVERNMENTAL INDUCEMENT AND THE DEFENSE OF ENTRAPMENT.

At the close of the government's case, appellant moved for judgment of acquittal on the ground that the cross-examination of Peterson had elicited evidence of inducement and that the government had failed to prove beyond a reasonable doubt that the appellant was ready and willing awaiting any opportunity to commit the crime. (Tr. 159.) At the close of all the evidence, appellant renewed his motion which was denied by Judge Zampano. (Tr. 250-251.)

It is appellant's position that the bombardment of phone calls and pressure from Robin Bourgeois, the paid informant, and agent Peterson from August, 1975, through April, 1976, induced the sales alleged in the indictment. There was no evidence prior to August, 1975, or October, 1975, that appellant was engaged in the business of dealing in firearms. The defense of entrapment deals with how the crime "originates." Sorrells v. United States, 287 U.S. 435, 442 (1932). There is no iron-clad rule that the reluctance that indicates a lack of propensity must continue throughout the transaction. United States v. Anglada, 524 F.2d 296, 299 (2d Cir. 1975). The government may prove propensity by showing (1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is

charged, or (3) a willingness to commit the crime for which he is charged, as evidenced by the accused's ready response to the inducement. United States v. Viviano, 437 F.2d 295, 299 (2d Cir.), cert. denied, 402 U.S. 983 (1971).

By presenting an indictment for the period from February 26 through April 6, 1976, the government has sought to use the November and December sales as evidence of an existing course of criminal conduct. However, the November and December sales were clearly a result of the solicitation and inducement by Bourgeois and Peterson, even when the evidence is viewed in a light most favorable to the government. There was no evidence in this trial from which one could infer that prior to November 1, 1975, the defendant engaged in an existing course of criminal conduct similar to the crime of dealing in firearms without a license. There is no evidence of an already formed design on the part of the accused prior to November 1. Further from August, 1975, until April 6, 1976, eight months elapsed between the inducement or solicitation and the sale of eight firearms in April 6, 1976. This time lapse points to a reluctance not a willingness to commit the crime charged. There was no ready response.

The firearms which were sold by the appellant were not illegal in and of themselves. Although pressed for illegal weapons, such as sawed-off shotguns, there was no evidence that appellant ever came into contact with such weapons. Obviously the government's theory was based on the number of

firearms sold (10) and the agent's testimony concerning conversations with appellant. However, the numbers developed only in April of 1976, when eight firearms were sold. The government never claimed that the two firearms sold in December, 1975, were part of a business and did not challenge the appellant's claim that the firearms belonged to his brother-in-law, who asked appellant to sell the firearms because he needed Christmas money. As set forth in the Statement of Facts, the informant, according to his own testimony began his solicitation of the appellant in October, 1975 (App.-Tr. 166), by approaching appellant in person and telling appellant he had people who would pay top dollar for pistols, for rifles and shotguns. Peterson echoed Bourgeois in December, January, February, and March, with requests for heavy weapons. There was no evidence offered by the government of any prior association with firearms by the appellant. The pressure, even according to Peterson's and the informant's versions, never subsided from October, 1975, through April, 1976. Taking the evidence in the light most favorable to the government the evidence of propensity was insufficient to sustain this conviction. It is fair to say "that Congress could not have intended criminal punishment for this [appellant]." United States v. Russell, 411 U.S. 423, 435 (1973). This case is a perfect illustration of the effect trickery, deceit and constant eight-month pressure can have on a man who has lost his job and is struggling to provide for his family.

This Circuit requires that propensity or willingness to commit the offense be proven beyond a reasonable doubt. United States v. Riley, 363 F.2d 955, 958 (2d Cir. 1966). Under the Viviano test the government has failed to sustain its burden of proof, and this conviction should be reversed.

CONCLUSION

The evidence of propensity was insufficient to overcome the defense of entrapment, and this case should be remanded for entry of judgment of acquittal. If this Court finds the evidence of propensity sufficient, however, it should consider the prejudicial impact of the trial court's erroneous refusal to exclude evidence of the appellant's prior misdemeanor convictions, refusal to exclude the testimony of the informant concerning his opinion that the appellant was committing other crimes unrelated to the offense charged in the indictment, and the improper and prejudicial summation of the prosecutor.

Respectfully submitted,

By: Andrew B Bowman

Andrew B. Bowman
Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
Attorney for Appellant

Dated: March 21, 1977

CERTIFICATION

I hereby certify that two copies of the foregoing Brief and Appendix for Appellant were mailed to Hugh Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 21st day of March, 1977.

Andrew B. Bowman